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In the Matter of Certain Electronic Devices: Apple, Samsung, Patent Holdup, and the Public Interest

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Mark Kochuk[†]

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I. Introduction

In April 2011, Apple, Inc. (“Apple”) filed a lawsuit against Samsung Electronics Company, Ltd. (“Samsung”) for alleged copying of Apple’s iPad and iPhone technology and style.¹ This was merely the beginning of what would eventually become extensive multi-national litigation over the two companies’ mobile devices.² Since then, every major cellular maker has become

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¹ Apple v. Samsung, 888 F. Supp. 2d 976, 982 (N.D. Cal. 2012).

² See Florian Mueller, *Apple Seeks \$2.5 Billion in Damages From Samsung, Offers Half A Cent Per Standard-Essential Patent*, FOSS PATENTS (July 24, 2012, 12:00 PM), <http://www.fosspatents.com/2012/07/apple-seeks-25-billion-in-damages-from.html> (“[This current lawsuit is] only one of more than 50 lawsuits across the globe.”); Paul Barrett, *Apple’s War on Android*, BLOOMBERGBUSINESSWEEK (Mar. 24, 2012), available at <http://www.businessweek.com/articles/2012-03-29/apple-s-war-on-android> (presenting a history of Apple’s legal disputes with Samsung).

embroiled in disputes³ in what has been termed the “smartphone patent war.”⁴ Apple’s and Samsung’s own seemingly never-ending litigation has already resulted in numerous lawsuits around the globe, with cases typically involving billions of dollars in alleged damages.⁵ Most notably, one U.S. jury trial resulted in a payout of over \$1 billion to Apple for violations of its patent by Samsung.⁶ With even more lawsuits pending, it seems likely the two companies will be mired in litigation for the foreseeable future.⁷

Not one to be left out, Samsung filed its own complaint against Apple in the United States International Trade Commission (“USITC”), alleging that Apple’s iPhone, iPad, and iPod Touch devices infringed upon several Samsung patents in violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337, hereinafter “Section 337”).⁸ The USITC concluded Apple

³ Colleen Chien & Mark Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 4 (2012).

⁴ See Michael A. Carrier, *A Roadmap to the Smartphone Patent Wars and FRAND Licensing*, 4 (No. 2) CPI ANTITRUST CHRONICLE 1 (2012). Although the smartphone patent war encompasses more companies than just Apple and Samsung, this paper will focus only on Samsung’s dispute with Apple in the USITC. See Chien & Lemley, *supra* note 3, at 4.

⁵ See, e.g., *Apple v. Samsung*, 888 F. Supp. 2d 976, 982 (N.D. Cal. 2012) (United States); *Apple Wins Key German Patent Case Against Samsung*, HIGHBEAM RESEARCH (Sep. 9, 2011), available at <http://www.highbeam.com/doc/1G1-266606004.html> (Germany); *Apple v. Samsung Patent Trial Kicks Off in Australia*, REUTERS (July 23, 2012, 6:08 AM), <http://www.reuters.com/article/2012/07/23/us-apple-samsung-idUSBRE86M07V20120723> (Australia); *South Korean Court Rules Apple and Samsung Both Owe One Another Damages*, WIRED (Aug. 24, 2012, 2:37 PM), <http://www.wired.com/gadgetlab/2012/08/s-korea-court-rules-damages/> (South Korea).

⁶ Nick Wingfield, *Jury Awards \$1 Billion to Apple in Samsung Patent Case*, N.Y. TIMES (Aug. 24, 2012), available at <http://www.nytimes.com/2012/08/25/technology/jury-reaches-decision-in-apple-samsung-patent-trial.html>. As of the writing of this Note, this jury decision is on appeal in the U.S. Court of Appeals for the Federal Circuit. See *Apple*, 888 F. Supp. 2d at 982.

⁷ See, e.g., Richard Lawler, *Apple Adds Samsung’s Galaxy S III, Galaxy Note and Galaxy Note 10.1 to Ongoing Patent Lawsuit*, ENGADGET (Aug. 31, 2012), <http://www.engadget.com/2012/08/31/apple-samsung-galaxy-s-iii-galaxy-note-patent-lawsuit/> (detailing a still pending lawsuit by Apple against Samsung).

⁸ See *In the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, 1 (July 5, 2013) (Final) [hereinafter USITC Opinion], available at <http://essentialpatentblog.com/wp-content/uploads/sites/234/2013/07/337-TA-794-Commission-Opinion-Public-Version.pdf>.

had violated one of Samsung's telecommunication patents, and consequently issued an exclusionary order against the infringing Apple devices (also referred to as an "import ban"), along with a cease-and-desist order barring Apple from further selling the infringing devices.⁹ This order was subsequently overturned by President Obama's Executive Administration ("Executive Veto"), determining that the weight of public policy prevented exclusionary relief from being issued against Samsung's standard-essential patent ("SEP") license, which is encumbered by a pledge of fair, reasonable, and non-discriminatory ("FRAND") use.¹⁰ The Executive Veto was the first issued over a USITC ruling since 1987.¹¹ Going forward, the veto should protect consumers from the economic consequences of an import ban based on an infringement of a FRAND-encumbered SEP, and help to curtail abuse of the patent standards system.¹²

First, this Note will explore the relevant background law.¹³ Next, this Note will examine the facts and history of this particular Samsung and Apple dispute.¹⁴ This will be followed by an analysis of the Executive Veto and the public policy concerns with the USITC's exclusionary order.¹⁵ Finally, this Note will conclude that the Executive Administration was correct to veto the USITC's decision thereby protecting public and consumer interests.

⁹ *Id.* at 3.

¹⁰ Veto of USITC Inv. No. 337-TA-794 (2013) (letter from Ambassador Michael B. G. Froman to the Honorable Irving A. Williamson, Aug. 3, 2013) [hereinafter Executive Veto], available at http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

¹¹ Brent Kendall, *Obama Administration Vetoes Ban on Sale of Some Apple iPhones, iPads*, THE WALL STREET JOURNAL (Aug. 4, 2013, 12:09 PM), available at <http://online.wsj.com/article/SB10001424127887324136204578646192008412934.html>. This 1987 veto, issued under the Reagan administration, also featured Samsung. Rowan Wilson, *FRAND and Policy: Obama Vetoes ITC iPhone and iPad Ban*, OSS WATCH (August 6, 2013), <http://osswatch.jiscinvolve.org/wp/2013/08/06/frand-and-policy-obama-vetoes-itc-iphone-and-ipad-ban/>.

¹² See Florian Mueller, *Obama Administration Vetoes ITC Import Ban of Older iPhones and iPads over Samsung Patent*, FOSS PATENTS (Aug. 3, 2013, 8:56 PM), <http://www.fosspatents.com/2013/08/obama-administration-vetoes-itc-import.html>; Roger Parloff, *Obama Should Overturn an ITC Import Ban on Apple Phones*, CNN MONEY (July 30, 2013, 12:35 PM), <http://tech.fortune.cnn.com/2013/07/30/obama-should-overturn-an-itc-import-ban-on-apple-phones>.

¹³ See *infra* Part II.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part IV.

II. Background Law

A. Standards

Patent standards help ensure products are more valuable for consumers and less costly to produce.¹⁶ These standards are promulgated by standard-setting organizations ("SSO").¹⁷ Technological patents that are necessary to comply with a standard are known as standard-essential patents ("SEP").¹⁸ In the smartphone market, SEPs include wireless broadband technologies, video compression technologies, and telecommunication standards.¹⁹ Ideally, standards create value for consumers by "increasing competition, innovation, product quality, and choice."²⁰ Courts are more likely to grant relief for patents that are not essential to the implementation of a standard as it is easier to work around the non-essential patent and still make and sell a product.²¹ Today, standards have become fundamental to smart phone telecommunication devices due to their interoperability.²²

In the telecommunications industry, standards also contain a beneficial "network effect."²³ A single cellular device that is not

¹⁶ Joshua Wright, Comm'r, Fed. Trade Comm'n, SSOs, FRAND, Antitrust: Lessons from the Economics of Incomplete Contracts, 5 (Sep. 12, 2013), available at <http://ftc.gov/speeches/wright/130912cpip.pdf>.

¹⁷ See Carrier, *supra* note 4, at 2. Sometimes SSOs are referred to as Standard Development Organizations ("SDOs"). See *Frequently Asked Questions Regarding Patent Pools and Standard Setting Organizations*, OBLON SPIVAK, <http://www.oblon.com/frequently-asked-questions-regarding-patent-pools-and-standard-setting-organizations> (last visited Oct. 10, 2013). For the purposes of this paper, the two words are interchangeable.

¹⁸ See Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents* 2 (Stanford Pub. Law Working Paper No. 2243026, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243026.

¹⁹ See Carrier, *supra* note 4, at 2.

²⁰ FED. TRADE COMM'N, THIRD PARTY UNITED STATES FEDERAL TRADE COMMISSION'S STATEMENT ON THE PUBLIC INTEREST 2 (2012) [hereinafter FTC Statement], available at <http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf>.

²¹ See Carrier, *supra* note 4, at 4.

²² U.S. DEP'T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 2 (2013) [hereinafter USDOJ & USPTO Policy Statement], available at <http://www.justice.gov/atr/public/guidelines/290994.pdf>.

²³ See USITC Opinion, *supra* note 8, at 42.

connected to a network has little utility, but if the same device can connect to millions of other telephones and content providers, it can become very useful.²⁴ Therefore, “the value of any individual device is enhanced in proportion to the number of other devices to which it may connect.”²⁵ Standards help to make this network effect possible across different manufacturers and wireless networks.²⁶

Typically, for an SSO to agree to license an SEP, the holder must agree to license his patent on FRAND²⁷ terms.²⁸ This FRAND commitment serves two primary goals: (1) it promotes the standard by assuring companies implementing the standard that they will not be blocked from bringing their products to market so long as they are willing to pay reasonable royalties for any standard-essential patents; and (2) it provides reasonable rewards to those who invested in research to help develop the technology used by the standard.²⁹ The FRAND commitment also protects consumers who would otherwise have to bear the cost of a patent holder negotiating the license of his patent on terms that potentially could not be fair or reasonable.³⁰

SSOs and their members rely on these voluntary FRAND commitments to facilitate the bilateral licensing negotiations necessary for successful widespread adoption of a standard, and to provide assurances to implementers of the standard that the patented technologies will be available to parties seeking to license them.³¹ By making a FRAND licensing commitment, patent holders who focus on licensing their inventions benefit from an expanded source of revenue, while the patent holders who sell products and services related to the standard benefit from expanded market opportunities.³² Patent holders are encouraged

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ In some jurisdictions, SSO members may have their members' license on reasonable and non-discriminatory terms (“RAND”). See USDOJ & USPTO Policy Statement, *supra* note 22, at n.2. For the purposes of this paper, FRAND and RAND pledges are interchangeable.

²⁸ FTC Statement, *supra* note 20, at 2.

²⁹ See Lemley & Shapiro, *supra* note 18.

³⁰ USDOJ & USPTO Policy Statement, *supra* note 22, at 4.

³¹ *Id.* at 5.

³² *Id.*

by these incentives to contribute their best technology to the standardization process.³³ A FRAND commitment may also contribute to increased follow-on innovation by granting new and established market entrants non-discriminatory access to protected networks, allowing new generations of network-operable devices to be produced and introduced into the market.³⁴ Due to the beneficial nature of FRAND pledges, the United States strongly encourages FRAND use in the standards process, which helps strengthen the public interest and protect consumers.³⁵

B. Patent Holdup

Patent holdup is a process wherein an SEP owner demands unreasonably high royalty rates and other favorable terms after adopting the essential standard in question.³⁶ This is of particular concern when such favorable terms could not have been credibly demanded beforehand.³⁷ Standards licensing can enable patent holdup because it may not be feasible to deviate from a standard unless all or most other participants in the industry agree to do so in compatible ways.³⁸ Even so, all the participants face substantial switching costs in abandoning any initial designs and substituting a different technology.³⁹ This leaves an entire industry to become locked into a standard, thereby giving an SEP owner in the industry the unreasonable ability “to demand and obtain royalty payments based not on the true market value of its patents, but on the costs and delays of switching away from the standardized technology.”⁴⁰

The problem with patent holdup, and even the threat of patent holdup, is that it increases costs and uncertainty for other industry participants, and deters innovation.⁴¹ This harms consumers by

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ FTC Statement, *supra* note 20, at 2; *see also* USDOJ & USPTO Policy Statement, *supra* note 22, at 4 (“asserting the patent to exclude a competitor from a market or obtain a higher price for its use than would have been possible before the standard was set, when alternative technologies could have been chosen”).

³⁷ FTC Statement, *supra* note 20, at 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 3.

breaking the connection between the value of an invention and its reward.⁴² The unwarranted higher royalties are then passed onto consumers in the form of higher prices.⁴³ Furthermore, the threat of holdup may “reduce the value of standard-setting, leading firms to rely less on the standard setting process and depriving consumers of the substantial pro-competitive benefits of standard setting.”⁴⁴

The resulting imbalance between the value of patented technology and the rewards for innovation may be especially acute where the exclusion order is based on a patent covering a small component of a complex and multicomponent product.⁴⁵ This is particularly relevant for smartphone and tablet devices, which are generally very complex and consist of many standardized and patented components.⁴⁶ As such, the presence of patent holdup in the smartphone market makes the cost to the public particularly high.⁴⁷

There is also a phenomenon known as reverse patent holdup, wherein an implementer utilizes something that is protected as a FRAND-encumbered SEP without providing compensation, while simultaneously claiming that the patent owner’s offers to license were not fair or reasonable.⁴⁸ The infringer in this scenario is essentially enacting a constructive refusal to negotiate with a FRAND license or pay a FRAND-based royalty fee.⁴⁹ This leaves the infringed patent owner to have to protect himself through costly litigation.⁵⁰ The SEP holder can also be harmed by the delay between the time of patent infringement and the issuance of an exclusionary remedy to protect his rights.⁵¹

A FRAND commitment serves as evidence that an SEP owner planned to monetize its property through broad licensing on

⁴² *Id.*

⁴³ USDOJ & USPTO Policy Statement, *supra* note 22, at 4.

⁴⁴ FTC Statement, *supra* note 20, at 2.

⁴⁵ *Id.*

⁴⁶ Chien & Lemley, *supra* note 3, at 24–25.

⁴⁷ *See id.* at 25.

⁴⁸ *See* USITC Opinion, *supra* note 8, at 63.

⁴⁹ *See* Executive Veto, *supra* note 10, at 2.

⁵⁰ *See* USITC Opinion, *supra* note 8, at 63.

⁵¹ *See id.*

reasonable terms as opposed to licensing through exclusive use.⁵² As such, FRAND commitments should ideally mitigate the risk of patent holdup by forcing the SEP patent holder to negotiate on fair, reasonable, and non-discriminatory terms.⁵³ However, concern remains that a patentee may make a FRAND commitment and then proceed to seek an exclusionary order for infringement of that FRAND-encumbered SEP to secure royalties that would otherwise be inconsistent with the FRAND commitment.⁵⁴ After all, a royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee, and thereby creates tension with the FRAND commitment.⁵⁵ The aforementioned high switching costs, when combined with the threat of an exclusionary order, could allow a patentee to obtain unreasonable licensing terms despite his FRAND commitment to the contrary.⁵⁶ The patentee is thus rewarded not because his invention is valuable, but simply because implementers are locked in to practicing the standard and are left with no recourse but to bow down to the unfair negotiating terms (or to commit reverse patent holdup).⁵⁷ Realizing royalty rates that reflect patent holdup causes the cost to produce a product to rise.⁵⁸ This cost is subsequently passed down to consumers and undermines the entire standards setting process.⁵⁹

Entitling FRAND-encumbered SEP holders to automatic exclusionary relief for infringement creates an imbalance in negotiating strength between licensors and licensees and can lead to patent holdup.⁶⁰ Conversely, non-exclusionary remedies may reduce the chance of patent holdup associated with FRAND-encumbered SEPs, encouraging innovation by increasing certainty for groups investing in products that comply with standards and any complementary technologies.⁶¹ Non-exclusionary remedies

⁵² FTC Statement, *supra* note 20, at 5.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 1.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ FTC Statement, *supra* note 20, at 3-4.

⁵⁹ *Id.*

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 5.

are thereby more consistent with the proper role of the standards patent system.⁶² Such non-exclusionary remedies may also prevent the price increases associated with patent holdup without necessarily reducing incentives to innovate.⁶³ Due to the particularly heavy cost consumers bear from exclusionary remedies when there is presence of patent holdup of FRAND-encumbered SEP patents, many U.S. governmental agencies worry about how exclusionary remedies in such circumstances impact the competitive conditions in the United States.⁶⁴

C. Section 337

Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337 or “Section 337”) provides relief for unfair practices in import trade.⁶⁵ The statute specifically prohibits the import of products that infringe a valid United States patents.⁶⁶ Moreover, besides protecting patent holders, the statute also protects the public interest, reading in pertinent part:

If the Commission determines, as a result of an investigation under this Section, that there is a violation of this Section, it shall direct that the articles concerned, imported by any person violating the provision of this Section, be excluded from entry into the United States, *unless*, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.⁶⁷

It is important to parse out from Section 337 the four specifically identified public policy factors for consideration when giving exclusionary remedies. When the USITC decides to issue an exclusionary order, it must consider how the order would affect: (1) the public health and welfare; (2) competitive conditions in the United States economy; (3) the production of like or directly

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See, e.g.*, FTC Statement, *supra* note 20, at 3; USDOJ & USPTO Policy Statement, *supra* note 22, at 4.

⁶⁵ 19 U.S.C. § 1337 (2011).

⁶⁶ 19 U.S.C. § 1337(a)(1)(B) (2011).

⁶⁷ 19 U.S.C. § 1337(d)(1) (2006) (emphasis added).

competitive articles in the United States; and (4) the United States consumers (hereinafter collectively referred to as the "public policy factors").⁶⁸ The same factors must also be considered when issuing cease and desist orders under the statute.⁶⁹ Cease and desist orders have a similar effect on consumers and the public as exclusionary orders.⁷⁰

These public policy factors allow the USITC, if it so chooses, to take into consideration the presence of patent holdup and any possible FRAND obligations at play in determining its remedy for an infringed SEP patent.⁷¹ Since patent holdup involving FRAND-encumbered SEP patents is so detrimental to consumers,⁷² its presence can drastically affect possible available remedies for the infringed patent holder.⁷³ Notably, however, the USITC has been very reluctant to modify exclusionary orders based on an examination of the Section 337 public policy factors.⁷⁴ The Commission has regularly rejected public interest arguments when it finds either that alternative suppliers cannot provide comparable products or that the products are not critical to public health and welfare.⁷⁵ For example, if a patentee can supply all the domestic demand, the Commission finds no public interest problem, even if the patentee will only satisfy the demand at a higher price.⁷⁶ As was the USITC's current trend at the time of this Apple and Samsung litigation, the Commission has not considered higher prices (and lower availability) of recreational products to

⁶⁸ *See id.*

⁶⁹ 19 U.S.C. § 1337(f)(1); USITC Opinion, *supra* note 8, at 105.

⁷⁰ Chien & Lemley, *supra* note 3, at 4. For the purposes of this paper, cease and desist orders have no notable difference in effect as exclusionary orders, and all arguments applied against exclusionary orders apply to cease and desist orders, unless otherwise noted.

⁷¹ *Id.* at 4.

⁷² *See supra* Part I.B. for more information about patent holdup's impact on consumers.

⁷³ *See generally* Executive Veto, *supra* note 10 (explaining the careful eye needed when there is patent holdup threat for FRAND-encumbered SEPs).

⁷⁴ Examples of when the factors did affect the USITC's orders include car parts necessary for improved fuel efficiency, scientific equipment for nuclear physics research, and hospital burn recovery beds. Chien & Lemley, *supra* note 3, at 19–20.

⁷⁵ *Id.* at 23.

⁷⁶ *Id.*

consumers to be of notable concern to the public welfare.⁷⁷

III. Procedural History

A. USITC Order

Samsung filed a complaint to the USITC alleging that its patent numbers 7,706,348 (the “348 patent”), 7,486,644 (the “644 patent”), 7,450,114 (the “114 patent”), and 6,771,980 (the “980 patent”) have been infringed by Apple.⁷⁸ Specifically, Samsung claims that Apple’s various iPhones, iPads, iPod Touch devices violate the aforementioned Samsung patents, and thereby also violate Section 337.⁷⁹ For the purposes of this Note, only the ‘348 patent is at issue, as the other three patents were ultimately found to have not been infringed upon.⁸⁰

Samsung’s ‘348 patent is considered essential under the Universal Mobile Telecommunications Standard (“UMTS”), which is a technical standard issued by the European Telecommunications Standards Institute (“ETSI”), an SSO headquartered in France.⁸¹ Both Apple and Samsung are members of the ETSI.⁸² The ETSI is one of six SSOs that combine to form what is known as the Third Generation Partnership (“3GPP”), which sets the standard for mobile wireless carrier technologies, including the UMTS standard.⁸³ Since Samsung’s ‘348 patent is declared essential under the UMTS standard, it is considered an SEP, and is also licensed under FRAND terms.⁸⁴

The ‘348 patent is titled as the “Apparatus and Method for Encoding/Decoding Transport Format Indicator in CDMA Mobile Communication System.”⁸⁵ The patent, summarized in the most basic way, concerns the way a device connects wirelessly to a network.⁸⁶ The apparatus in question encodes and decodes

⁷⁷ *Id.*

⁷⁸ See USITC Opinion, *supra* note 8, at 1.

⁷⁹ *Id.*

⁸⁰ *Id.* at 3.

⁸¹ *Id.* at 1.

⁸² *Id.* at 42.

⁸³ *Id.* at 42–43.

⁸⁴ See USITC Opinion, *supra* note 8, at 2.

⁸⁵ *Id.* at 6.

⁸⁶ See *id.*

transport format combination indicator protocol signals ("TFCI signals") within a cellular network.⁸⁷ The TFCI signals encode a receiver of a transmitted data rate into longer codewords to help ensure the information is received correctly.⁸⁸ With respect to the '348 patent, Samsung accused the AT&T models of Apple's iPhone 4; iPhone 3GS; iPhone 3; iPad 3G; and iPad 2 3G (collectively the "accused '348 products") of infringement of this apparatus.⁸⁹

Earlier in the dispute, the presiding administrative law judge issued an initial determination finding ("ID") that Samsung's '348 patent was valid, but that Apple was not infringing upon it.⁹⁰ Samsung, Apple, and the Commission investigative attorney all filed petitions for review of the final ID to the USITC.⁹¹ The USITC reversed the ID in part and found that Apple's accused '348 products infringed upon Samsung's '348 patent because the Intel baseband processor in the accused devices contained identical relevant source code.⁹² Specifically, the Apple devices implemented the same TFCI encoding scheme as the '348 patent.⁹³ After rejecting Apple's various affirmative defenses,⁹⁴ the USITC remedied Samsung's harm by issuing an import ban exclusionary order, along with a cease-and-desist order against the infringing Apple products.⁹⁵ The Commission explicitly refused to delay the effective date of its exclusionary order,⁹⁶ but Apple was permitted to import its devices during the Executive sixty-day review period with a bond set at 0% because Samsung was unable to show that its products needed protection.⁹⁷

The USITC undertook an examination of the public policy factors as required by Section 337.⁹⁸ The Commission concluded

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 21.

⁹⁰ See USITC Opinion, *supra* note 8, at 1.

⁹¹ *Id.*

⁹² *Id.* at 3.

⁹³ *Id.* at 21–23.

⁹⁴ See *id.* at 41–66.

⁹⁵ *Id.* at 3–4.

⁹⁶ See USITC Opinion, *supra* note 8, at 115–17.

⁹⁷ *Id.* at 118–19.

⁹⁸ *Id.* at 107.

that excluding the pertinent Apple iPhones and iPads would not have an “adverse effect” on the “public health and welfare.”⁹⁹ Nor did the Commission believe that the exclusionary orders would adversely affect the “production of like or directly competitive articles in the United States,” as none of the competitive articles in question (i.e., smartphones and tablets) are actually produced in the United States.¹⁰⁰ The Commission further believed that the exclusionary order’s effect on “competitive conditions in the United States economy” and on “U.S. consumers” would have a small overall impact.¹⁰¹ Also factoring into the decision was the notion that a wide variety of other smartphone and tablet devices from Apple would still be available to the public.¹⁰² Simply put, the Commission did not view the exclusionary order’s effect on the public interest as a whole to be adverse enough as to warrant denying exclusionary relief for Samsung.¹⁰³

B. Executive Veto

On August 3, 2013, President Obama’s Executive Administration issued a veto over the USITC’s order.¹⁰⁴ Section 337 requires the President to engage in a policy evaluation of any exclusionary or cease and desist order issued by the USITC.¹⁰⁵ The President is also given the power to veto a USITC exclusionary order on policy grounds.¹⁰⁶ This authority of the President has been delegated to the United States Trade Representative.¹⁰⁷ The Executive Administration grounded the veto within an analysis of the Section 337 policy factors.¹⁰⁸

The Executive Administration’s explanation of the veto, issued in memorandum, gives explicit reference and support to a “Policy Statement,” issued by the United States Department of Justice

⁹⁹ *Id.* at 109.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See USITC Opinion, *supra* note 8, at 110.

¹⁰³ *Id.* at 111.

¹⁰⁴ See Executive Veto, *supra* note 10.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.* An exclusionary order does go into effect during this sixty-day period unless the respondents post a bond. Chien & Lemley, *supra* note 3, at 31–32.

¹⁰⁷ Executive Veto, *supra* note 10, at 1.

¹⁰⁸ See *id.*

("DOJ"), Antitrust Division, and U.S. Patent and Trademark Office ("USPTO"), concerning SEPs subject to FRAND commitments.¹⁰⁹ The policy statement gives extra weight to the Section 337 public policy analysis whenever a possible issue of patent holdup is present.¹¹⁰ The statement further indicates that the public policy factors listed in Section 337 should be given "overriding consideration[]" when determining the proper remedy for an infringed SEP burdened with a FRAND obligation.¹¹¹ Finally, the statement reiterates that a patent owner making a voluntary FRAND commitment may affect whether an exclusionary order is the appropriate remedy for an infringement.¹¹²

The Executive Administration further explained that remedying a FRAND-encumbered SEP, because of the possible presence of patent holdup, is not as straight forward as remedying a non-standards essential patent.¹¹³ While acknowledging the desire to promote innovation and economic progress, which includes providing adequate remedies and protection of intellectual property rights, the Executive Administration continuously stressed the importance of a thorough review of the public policy considerations when dealing with SEPs licensed on FRAND terms, mainly due to concern about patent holdup and its detrimental nature toward the public at large.¹¹⁴ Without reviewing the actual legal analysis and findings of the USITC, the Executive Administration decided to veto the USITC exclusionary remedy based solely on this public policy consideration, worrying about the effect this exclusionary order would have on competitive conditions in the U.S. economy, along with its effect toward U.S. consumers.¹¹⁵

The Executive Administration was clear that it is not claiming

¹⁰⁹ *Id.* at 1–2.

¹¹⁰ See USDOJ & USPTO Policy Statement, *supra* note 22, at 8–9.

¹¹¹ *Id.* at 10.

¹¹² *Id.* at 6.

¹¹³ See generally Executive Veto, *supra* note 10 (underscoring the need for a thorough examination of FRAND-encumbered SEPs).

¹¹⁴ *Id.* at 2–3.

¹¹⁵ *Id.* at 3. The Administration does not mention whether any specific facts of the case at issue (such as the nature of the products being excluded) impacted its public policy analysis in any way, preferring to present a more holistic approach.

that a patent encumbered with a FRAND commitment is a universal *per se* bar that precludes an exclusionary order remedy.¹¹⁶ In fact, the Executive Administration noted there are situations where an exclusionary remedy of a FRAND-encumbered SEP would still be applicable, but simply does not think that is the case here.¹¹⁷ Furthermore, the prevention of an exclusionary remedy is not to say that a FRAND-encumbered patent holder is prevented from recovering its injury in another form.¹¹⁸ The patent holder is still entitled to receive “appropriate compensation that reflects the value of the technology contributed to the standard,”¹¹⁹ although the Executive Administration does not postulate what that would amount to in this case.¹²⁰

Finally, the Executive Administration laid out guidelines for the Commission to follow to avoid a future veto.¹²¹ These guidelines stipulated that the USITC should: (1) examine carefully the public policy factors listed in Section 337 when determining a particular remedy; and (2) develop factual records concerning the standard-essential nature of a patent at issue and the possible presence of patent holdup or reverse holdup, and to make explicit findings on the issue.¹²² In the future, the Executive Administration will expect the USITC to undertake a close policy review in any decisions involving FRAND-encumbered SEPs, looking for the possible presence of patent holdup and toward the standards-essential nature of the patent at issue in order to make a determination if an exclusionary remedy would be in the public interest.¹²³

¹¹⁶ USDOJ & USPTO Policy Statement, *supra* note 22, at 7.

¹¹⁷ Executive Veto, *supra* note 10, at n.3. One instance calling for an exclusionary remedy would be a FRAND-encumbered SEP whose “putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder’s commitment to license on F/RAND terms.” *Id.*

¹¹⁸ *See id.*

¹¹⁹ USDOJ & USPTO Policy Statement, *supra* note 22, at 8.

¹²⁰ *See* Executive Veto, *supra* note 10.

¹²¹ *Id.* at 3.

¹²² *Id.*

¹²³ *Id.*

IV. Analysis

A. Support for the Executive Veto

Many governmental agencies have issued policy statements regarding patent holdup and its relationship with the Section 337 public policy factors.¹²⁴ As mentioned earlier, the USDOJ and the USPTO have supported a broad reading of the public policy factors whenever voluntary FRAND commitments are involved.¹²⁵ The Federal Trade Commission ("FTC") has also weighed in on the matter, noting that, in cases that address FRAND-encumbered SEPs, the FTC urges the USITC to follow the requirements of Section 337's public policy factors and to specifically consider the impact of patent holdup on competitive conditions and United States consumers.¹²⁶ The FTC statement postulated that "ITC issuance of an exclusion or cease and desist order in matters involving [F]RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation."¹²⁷ Furthermore, a bipartisan group of Senators hinted that a veto of the USITC order would be justified.¹²⁸ Referring to the issued order, the group noted:

[a]ny precedent that would enable or encourage companies to include their patented technology in a standard, commit to license included patents on FRAND terms, and then seek or threaten to seek to secure an exclusion order against a willing licensee despite a breach of that commitment would thus implicate significant policy concerns. Such an outcome could undermine broad participation in the standards-setting process and in turn threaten the meaningful benefits these standards provide for competition and consumers.¹²⁹

While the Senators did not take a position on the merits of the case

¹²⁴ See, e.g., Executive Veto, *supra* note 10; FTC Statement, *supra* note 20.

¹²⁵ USDOJ & USPTO Policy Statement, *supra* note 22, at 9–10.

¹²⁶ FTC Statement, *supra* note 20, at 1–2.

¹²⁷ *Id.* at 1.

¹²⁸ See Letter from U.S. Sens. Amy Klobuchar, Mike Lee, Barbara Boxer & James Risch to Michael Froman, U.S. Trade Representative, Exec. Office of the Pres. (July 30, 2013), available at <http://www.scribd.com/doc/157168884/13-07-30-Senators-to-USTR-Letter-Samsung-Apple>.

¹²⁹ *Id.*

at hand, they urged the Executive Administration to give serious consideration to public policy factors when deciding whether to veto a USITC order.¹³⁰ The Senators expressed concern that companies would be less likely to participate in standards if they could not count on fair dealings with companies who have FRAND commitments.¹³¹

Also weighing in favor of the Executive Veto is the fact that patent holdup remains a particular concern whenever the patent is a small component part of larger complex products, as is the case for patent '348.¹³² For example, a patent on a particular circuit layout may constitute only a tiny fraction of the value of a microprocessor that uses the layout, but an exclusion order would exclude the microprocessor as a whole, not only preventing importation of the small infringing element, but also importation of the larger and non-infringing elements.¹³³ This phenomenon creates disproportionate social harm, another reason to consider applying the public interest exception.¹³⁴ Something similar is happening in this case, where patent '348's baseband processor code is but a small component of smartphone devices.¹³⁵ The exclusion order affects more than just the supply of the processor (i.e., the infringing feature); it affects the price and supply of all components in smartphone devices, and the devices as a whole (i.e., the non-infringing features and functionalities).¹³⁶ An exclusionary order in this case also affects the customers and third parties who rely on these non-infringing features, along with the companies whose research and development go into the non-infringing components.¹³⁷ The situation patent holdup creates for small components of larger complex devices just what Section 337's public policy factors are aimed at preventing: cost and harm to consumers.¹³⁸

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Chien & Lemley, *supra* note 3, at 24–25 (discussing the dynamics of patent holdup).

¹³³ *Id.* at 25.

¹³⁴ *Id.*

¹³⁵ See USITC Opinion, *supra* note 8, at D5.

¹³⁶ *Id.* at 27.

¹³⁷ *Id.*

¹³⁸ See Executive Veto, *supra* note 10, at 2–3.

Whether Samsung actually violated its FRAND obligations is in dispute.¹³⁹ Samsung maintains it made multiple good faith offers to Apple.¹⁴⁰ Samsung's offer to Apple consisted of 2.4 percent of the chip price royalty rate,¹⁴¹ or required a non-SEP Apple license in return for license of Samsung's '348 patent.¹⁴² Apple contended that an offer of 2.4 percent royalty does not satisfy a FRAND obligation, is exploitative, and was being used to exclude Apple products from the market.¹⁴³ For standard-essential patents, a reasonable royalty should be based on a "hypothetical arms-length negotiation" that takes place at the time the SSO is selecting the standard.¹⁴⁴ One Dutch court found the 2.4 percent royalty offer so unreasonable, "so far out of the FRAND ballpark," that it concluded Samsung must have violated its FRAND obligation.¹⁴⁵ The European Commission also issued a Statement of Objections asserting that Samsung, in negotiating with Apple, abused its position beyond what its FRAND obligation allows.¹⁴⁶ In a letter to Samsung, Apple claimed, "Samsung's demand would imply approximately a 44 percent aggregate royalty burden on UMTS products. This is far above the 5–7 percent range that Samsung argued (in its earlier litigation with Ericsson and InterDigital) was the appropriate range for aggregate royalties."¹⁴⁷

¹³⁹ See USITC Opinion, *supra* note 8, at 53–64.

¹⁴⁰ See *id.* at A24.

¹⁴¹ *Id.* at 55.

¹⁴² *Id.* at D3.

¹⁴³ See *id.* at A25; see also Florian Mueller, *Apple Seeks \$2.5 Billion in Damages from Samsung, Offers Half A Cent Per Standard-Essential Patent*, FOSSPATENTS (July 24, 2012), <http://www.fosspatents.com/2012/07/apple-seeks-25-billion-in-damages-from.html> (discussing Apple's comparison of Samsung's offer to its own estimated values).

¹⁴⁴ See Lemley & Shapiro, *supra* note 3, at 1147.

¹⁴⁵ Florian Mueller, *Samsung Loses Dutch Case Against Apple Over 3G Patents As Court Gives Meaning to FRAND*, FOSSPATENTS (Oct. 14, 2011), <http://www.fosspatents.com/2011/10/samsung-loses-dutch-case-against-apple.html>.

¹⁴⁶ EUROPEAN COMMISSION, *Antitrust: Commission Sends Statement of Objections to Samsung on Potential Misuse of Mobile Phone Standard-Essential Patents*, EUROPA (Dec. 21, 2012), http://europa.eu/rapid/press-release_IP-12-1448_en.htm.

¹⁴⁷ Letter from Boris Teksler, Director of Patent Licensing & Strategy, Apple, to Seongwoo Kim, Director, Samsung Electronics 2 (April 30, 2012), filed as Decl. John M. Pierce, Ex. 18, Apple, Inc., v. Samsung Electronics Co., 909 F. Supp. 2d 1147 (N.D. Cal. 2012) (No. 5:11-CV-01846), ECF No. 2038-19, *aff'd in part, vacated in part*, 735 F.3d 1352 (Fed. Cir. 2013), available at <http://www.scribd.com/doc/108832665/12-04-30-apple-samsung-teksler-kim-letter-re-frand>.

Samsung probably put the royalty price so high in order to gain bargaining leverage to extract some sort of cross-license agreement from Apple.¹⁴⁸ This negotiating tactic is questionable when one has promised to offer a license on fair and reasonable terms.¹⁴⁹ Finally, Commissioner Pinkert, in his dissent from the USITC order, noted his belief that Samsung's offer to Apple did not "satisfy an objective standard of reasonableness"¹⁵⁰

Commissioner Pinkert also read the public interest factors more broadly than his peers.¹⁵¹ He grounded this view in the legislative history of Section 337, which, he argues, indicates the factors are an overriding consideration, and that "any evidence" of exploitative monopolistic practices (i.e., patent holdup) is a proper basis for denying exclusion.¹⁵² By refusing to make a FRAND patent *available* on reasonable terms, especially for a patent covering a minor element of a complex product, the patent holder is harming the public welfare, in Pinkert's view.¹⁵³ Disagreeing with the majority, Pinkert believes eliminating the iPhone 4 and iPad 2 competition denies the public not only those devices themselves, but also access to a large and diverse library of software applications unique to Apple and its devices.¹⁵⁴ The iPhone is highly interoperable with other Apple devices, and the exclusionary order would completely eliminate this benefit to the U.S. economy, even though the order ostensibly covers only a small component of the product.¹⁵⁵ Pinkert would therefore deny an exclusionary order in this specific case after considering Section 337's public policy factors and his belief that Samsung breached its FRAND obligations and caused patent holdup.¹⁵⁶

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*; see also Florian Mueller, *Apple Filing Reveals Samsung Recently Reduced its 2.4% Royalty Demand for Standard-Essential Patents*, FOSSPATENTS (April 5, 2013), <http://www.fosspatents.com/2013/04/apple-filing-reveals-samsung-recently.html> (discussing Samsung's negotiating tactics).

¹⁵⁰ USITC Opinion, *supra* note 8, at D3.

¹⁵¹ *See id.* at D4.

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *Id.* at D7.

¹⁵⁵ *See id.* at D6–D7.

¹⁵⁶ *See* USITC OPINION, *supra* note 8. Note, however, that Pinkert does not suggest an alternative remedy for Samsung. Presumably it would be monetary in nature, although how much he does not speculate. Alternative remedies for infringed patents

Apple argued in the proceedings that the existence of a FRAND obligation precludes an exclusionary order except in extraordinary circumstances.¹⁵⁷ Once again, patent holdup is presented as the ultimate fear, a “dead-weight” economic loss that cuts companies’ investment in research, design, and supply of products, inhibits competition in the United States, and drives up the prices of wireless-communication devices.¹⁵⁸ Apple is not alone in this position.¹⁵⁹ Other entities who expressed formal concern over exclusionary orders for SEP holders with FRAND obligations include: the Association for Competitive Technologies; the Business Software Alliance; Ericsson, Inc.; Hewlett-Packard; and Intel Corporation.¹⁶⁰ Naturally, these groups’ self-interests may influence their views on the matter.

Finally, it is worth mentioning again that none of the preceding rationales proclaim a universal *per se* bar from issuing exclusionary orders against a FRAND-encumbered SEP that would set bad precedent.¹⁶¹ Rather, it is a relatively *ad hoc* approach wherein the public interest factors are weighed against the need for the exclusionary remedy.¹⁶² In this case, the perceived public harm from the USITC’s exclusionary order is an overriding concern that outweighs its benefit for Samsung.¹⁶³

B. Opposition to the Executive Veto

Despite the presence of a FRAND-encumbered SEP patent, it is debatable whether there actually was patent holdup in this case.¹⁶⁴ The USITC majority, for example, held that Apple never actually proved violation of any FRAND obligation¹⁶⁵ or

besides exclusionary orders are discussed later in this paper, *infra*, Section III(c).

¹⁵⁷ See *id.* at A3.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., *id.* at A4–A9.

¹⁶⁰ *Id.* at A4–A9.

¹⁶¹ See Executive veto, *supra* note 10, at n.3 (citing U.S. Dep’t. of Justice & U.S. Patent and Trademark Office, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary FRAND Commitments (2013), available at <http://www.justice.gov/atr/public/guidelines/290994.pdf>).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See USITC Opinion, *supra* note 8, at 66 (“[T]he record evidence shows that ‘hold-up’ concern is not present here.”).

¹⁶⁵ *Id.* at 113.

negotiated in bad faith,¹⁶⁶ and instead declared that Samsung had widely licensed the '348 patent.¹⁶⁷ The USITC went even further to suggest that Apple may be committing reverse patent holdup by refusing to pay FRAND royalties until after the litigation is settled, by delaying the patent holder (Samsung) from an exclusionary remedy of its infringed patent, and by leaving expensive litigation as Samsung's only option for protecting its intellectual-property rights.¹⁶⁸ While the legal findings of the USITC control the matter at hand, other groups, such as the European Commission, have expressed official condemnation toward Samsung for abusing its position as an SEP holder.¹⁶⁹ The actual truth of the matter remains debatable.¹⁷⁰

The South Korean government has raised concern over the veto (Samsung is headquartered in Seoul, South Korea).¹⁷¹ To put the concern in context, the USITC import ban order was Samsung's most significant win in its on-going litigation with Apple, and Samsung's only significant win in the United States judicial system.¹⁷² Despite finally getting a notable legal victory, the United States government stepped in and essentially took the victory away from Samsung, a South Korean-based company, and gave it to Apple, a United States-based company. However, the Executive Veto was not issued in a vacuum, and there is substantial support for the rationale behind the veto regardless of

¹⁶⁶ *Id.* at 59.

¹⁶⁷ *Id.* at 113.

¹⁶⁸ *Id.* at 63.

¹⁶⁹ See e.g., EUROPEAN COMMISSION, *Antitrust: Commission Sends Statement of Objections to Samsung on Potential Misuse of Mobile Phone Standard-Essential Patents*, EUROPA (Dec. 21, 2012), http://europa.eu/rapid/press-release_IP-12-1448_en.htm.

¹⁷⁰ The Executive Administration chose to remain silent as to any legal findings concerning Samsung's negotiating tactics, although its policy review of patent holdup suggests that the Executive Administration found it to at least be somewhat relevant for the matter at hand, which implicates Samsung.

¹⁷¹ *South Korea Says Concerned About U.S. Decision on Some Apple Models*, REUTERS (Aug. 5, 2013 2:07 AM), <http://www.reuters.com/article/2013/08/05/us-samsung-apple-idUSBRE97405C20130805>; Brid-Aine Parnell, *South Korea: We're 'Concerned' that Obama Saved Apple from Ban*, THE REGISTER (Aug. 5, 2013), http://www.theregister.co.uk/2013/08/05/sk_gov_annoyed_by_obama_ban_decision.

¹⁷² See generally Florian Mueller, *Apple Isn't Winning the Patent Spat with Samsung Any More Than There Were Americans in Baghdad*, FOSSPATENTS (Aug. 12, 2012, 10:31 AM), <http://www.fosspatents.com/2013/08/apple-isnt-winning-patent-spat-with.html> (comparing Samsung's global litigation versus Apple's).

the location of the parties.¹⁷³ Consequently, the implicit allegations of home-cooking in favor of Apple are merely circumstantial.

Some technology groups¹⁷⁴ disagree with Apple's desire to mostly exclude exclusionary remedies for FRAND-encumbered SEPs, and advocate instead for relatively broad access to injunctive relief over SEPs.¹⁷⁵ For example, the Innovation Alliance stated that "[i]t is hard to see how [a decision denying exclusionary remedies] will do anything but lead to less participation in standard setting bodies and more litigation involving not just standard essential patents, but also declared-standard essential patents. That is bad for innovation and bad for U.S. consumers."¹⁷⁶ Just as with Apple, and the groups that support Apple's position, companies have their own self-interests to protect, which may prejudice their proffered views on the matter.

Lastly, as an administrative agency, the USITC is not even capable of issuing a remedy other than an injunction or exclusionary orders.¹⁷⁷ While an award of monetary damages would be of greater benefit to public consumers while still providing a remedy for Samsung's wrong, the USITC lacks the power to do so even if it wanted.¹⁷⁸ However, there are some creative solutions the USITC could utilize, such as delaying the effect of the exclusionary order for a set period of time.¹⁷⁹ The Commission could also set a tailored bond, which has very similar effects as a monetary remedy since the infringer would not ultimately be completely barred from importing the infringing devices while the infringed patent holder would receive monetary

¹⁷³ See FTC Statement, *supra* note 20 (declaring a policy of carefully examining the Section 337 factors when there is possible patent holdup of FRAND-encumbered patents, issued a year earlier than the Executive veto).

¹⁷⁴ Such as GTW Associates; Innovation Alliance; Motorola Mobility, LLC; Qualcomm Inc.; and of course Samsung. See USITC Opinion, *supra* note 8, at A1-A13.

¹⁷⁵ Florian Mueller, *Yes We FRAND: Various Pending ITC Complaints over Standard-Essential Patents May Be Withdrawn*, FOSSPATENTS (Aug. 4, 2013, 8:05 AM), <http://www.fosspatents.com/2013/08/yes-we-frand-various-pending-itc.html>.

¹⁷⁶ *Id.*

¹⁷⁷ See Chien & Lemley, *supra* note 3, at 28 (stating that the ITC cannot award damages; it can only exclude products).

¹⁷⁸ Chien & Lemley, *supra* note 3, at 28.

¹⁷⁹ See FTC Statement, *supra* note 20, at 4.

compensation in some form.¹⁸⁰ This leaves the public free to benefit from the market competition.¹⁸¹ A patentee is also always free to file a claim in a district court wherein he may be able to get damages awarded, unlike in a USITC investigation.¹⁸²

C. Forward-looking ramifications

The Executive Veto's underlying rationale provides precedential value for the USITC to follow.¹⁸³ The veto specified guidelines for the USITC to follow, which will cause the USITC to seek to protect the public interest where there is threat of patent holdup.¹⁸⁴ Going forward, the USITC is likely to be at least somewhat less willing to grant exclusionary orders than before.¹⁸⁵ As a result, it is possible some litigants will choose to litigate in district courts, rather than bring an action under the USITC, in order to avoid the "ever-increasing bar" it will now take to get an USITC exclusionary order for any FRAND-encumbered patent.¹⁸⁶ Currently, the United States government has set up a U.S. Intellectual Property Enforcement Coordinator to start an interagency review of existing procedures that the USITC uses in order "to evaluate the scope of exclusion orders, and to ensure the process and standards utilized during exclusion order enforcement activities are transparent, effective, and efficient."¹⁸⁷

As to Apple and Samsung's current litigation troubles, the Executive Veto certainly gives Apple leverage over Samsung in its

¹⁸⁰ Chien & Lemley, *supra* note 3, at 32 (arguing that the ITC can use its statutory authority to set a bond to permit continued importation during the review period but condition that importation on the payment of money).

¹⁸¹ See Chien & Lemley, *supra* note 3, at 32 (arguing that small tweaks to those aspects of how the ITC awards injunctions can potentially yield big benefits to the public interest).

¹⁸² *Id.* at 28.

¹⁸³ See Executive Veto, *supra* note 10, at 3.

¹⁸⁴ *Id.*

¹⁸⁵ See *What Does the U.S. Trade Representative's Disapproval of the Samsung-Apple Exclusion Order Mean for SEP Cases at the ITC?*, ESSENTIAL PATENT BLOG (Aug. 6, 2013), <http://essentialpatentblog.com/2013/08/what-does-the-u-s-trade-representativ-es-disapproval-of-the-samsung-apple-exclusion-order-mean-for-sep-cases-at-the-itc> (projecting an increasing bar to be able to get ITC exclusion orders).

¹⁸⁶ *Id.*

¹⁸⁷ *Fact Sheet: White House Task Force on High-Tech Patent Issues*, THE WHITE HOUSE (June 04, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>.

other disputes currently under litigation, including any further negotiations for patent royalties with any other Samsung FRAND-encumbered SEPs.¹⁸⁸ Conversely, Samsung is now handicapped in being able to pursue higher licensing fees from Apple in any future negotiations the two companies may engage in, as well as with other companies in its FRAND-encumbered SEPs.¹⁸⁹ Samsung now needs to decide how it wishes to pursue a remedy of monetary compensation from Apple, and whether or not it wishes to file suit in district court.¹⁹⁰ A district court ruling of course cannot be vetoed by the Executive Administration, and is not bound by any USITC ruling.¹⁹¹ While Samsung is currently hurt by the Executive Veto, as indicated by a decline in Samsung's market value after the veto was issued,¹⁹² this decision should ultimately benefit Samsung when it is on the other side of the matter and acting as a licensee instead of a licensor.¹⁹³

It is hard to say what impact the Executive Veto will have on future FRAND negotiations. The Executive Veto certainly reduced the leverage of any holder of FRAND-encumbered SEPs, whether Samsung, Apple, or another company, in future negotiations.¹⁹⁴ Companies that hold a large amount of patents, and receive a large amount of royalties for such patents, may become limited in their revenue raising abilities (outside of developing new patents, which can be costly).¹⁹⁵ Ultimately, this

¹⁸⁸ Mueller, *supra* note 175.

¹⁸⁹ Susan Decker, Dawn Kopecki & Pui-Wing Tam, *iPhone Reprieve Seen Aiding Apple Sales, Hurting Samsung*, BLOOMBERG (Aug. 5, 2013 4:04 PM), <http://www.bloomberg.com/news/2013-08-04/iphone-reprieve-seen-aiding-apple-sales-hurting-samsung.html>.

¹⁹⁰ See Mueller, *supra* note 175.

¹⁹¹ *Id.* (stating that Samsung can't appeal the Presidential veto, but could appeal the part of the ITC ruling that threw out its non-SEP claims).

¹⁹² Yoni Heisler, *Samsung's Market Value Plummets Following US Presidential Veto*, TUAW (Aug. 5, 2013 1:30 PM), <http://www.tuaw.com/2013/08/05/samsung-market-value-plummets-following-us-presidential-veto>.

¹⁹³ See Mueller, *supra* note 175.

¹⁹⁴ *Id.* (stating that after the presidential veto it is still not impossible that someone might win a U.S. import ban over FRAND-pledged SEPs at some point, but only under rare and narrow circumstances).

¹⁹⁵ Decker et al., *supra* note 189 (arguing that the decision by U.S. Trade Representative Michael Froman could limit the ability of large patent-holding companies like Qualcomm Inc., InterDigital Inc. and Dolby Laboratories Inc. to rely on royalty revenue from standards patents used in smartphone chips or sound transmission),

may be for the best since the goal of the public policy factors is not to provide undue leverage for licensors, but rather to protect American consumers from any such undue leverage.¹⁹⁶

South Korea's courts have already decided cases in a way that has caused some to suggest the country may be becoming a "rogue state" in FRAND rights.¹⁹⁷ While Samsung has struggled to have success in its patent litigation in other countries, it has had success on their home turf in South Korea.¹⁹⁸ For example, earlier in 2012, the South Korean government banned some Apple devices for infringing Samsung SEPs.¹⁹⁹ This ban gives Samsung remarkable negotiating leverage with its SEPs (and thereby effectuates patent holdup), as Apple is forced to decide between writing off the Korean market, bowing to Samsung's negotiating demands,²⁰⁰ and seeking to resolve the matter through bilateral talks between the two countries' political systems.²⁰¹ It is possible, especially given the South Korean government's expressed concern over the Executive Veto, the country will continue to go down a strict path concerning FRAND and SEP rights. However, not everyone is concerned about South Korea's patent laws, noting that the South Korean court's decision was well-reasoned and that evidence of the South Korean courts construing FRAND rights unfairly in order to give a home field advantage to Samsung is lacking.²⁰²

As for the other ongoing disputes in the "smartphone patent wars," other technological companies may decide to withdraw

<http://www.bloomberg.com/news/2013-08-04/iphone-reprieve-seen-aiding-apple-sales-hurting-samsung.html>.

¹⁹⁶ See 19 U.S.C. § 1337 (2011); S. Rep. No. 93-1298, 93d Cong. 2d Sess. 199 (1974).

¹⁹⁷ Florian Mueller, *Apple-Samsung Ruling Suggests South Korea is a FRAND Rogue State*, FOSSPATENTS (Aug. 24, 2012), <http://www.fosspatents.com/2012/08/apple-samsung-ruling-suggests-south.html>.

¹⁹⁸ See *id.* (Apple was found to infringe on two Samsung wireless patents — which have previously been identified as standard-essential ones).

¹⁹⁹ *Id.*

²⁰⁰ This could include giving up some of the companies' non-standard-essential property, or paying exorbitant royalty rates.

²⁰¹ Mueller, *supra* note 197 (arguing that Apple should defend itself vigorously and, if necessary, write off the Korean market until the issue is resolved through bilateral U.S.-Korea talks or at the level of the World Trade Organization).

²⁰² Mark Summerfield, *South Korea is Not a 'FRAND Rogue State'*, PATENTOLOGY (Nov. 06, 2012 2:15 PM), <http://blog.patentology.com.au/2012/11/south-korea-is-not-frand-rogue-state.html>.

their complaints to the USITC for any SEPs the company may hold.²⁰³ Some believe the judicial courts are the appropriate venues for these disputes anyway, and view such an outcome as a positive development.²⁰⁴ Wells Fargo financial analyst Maynard Um has suggested that “[w]hile [the Executive Veto] does not devalue patents and patents will still be necessary as a form of offense and defense (particularly [SEPs]), companies may think twice about acquiring portfolios at any cost, given the potentially reduced chance of being awarded a cease and desist order.”²⁰⁵ How the Executive Veto may affect future patent litigation strategy is currently murky, but going forward it certainly will give licensees a negotiating advantage over licensors.²⁰⁶ The full ramifications of the Executive Veto may not manifest themselves for years to come.

V. Conclusion

The Executive Veto presents a “victory for consumers and fair competition.”²⁰⁷ The USITC order severely underestimated the vastness and pervasiveness of the smartphone market in the U.S. economy. Denying an entire generation of smartphones and tablets solely due to an infringement of a smaller component has astronomical repercussions for the public. When a FRAND-encumbered SEP is involved, exclusionary remedies that would remove products from the market will always impose high costs on consumers, but would have been especially acute here. Certainly, Samsung is entitled to a remedy for its infringed patent, but the USITC exclusionary order was not the right remedy in this case as it would essentially force the public to have to bear the cost of Apple’s wrongdoing. While the public interest happens to coincide with Apple’s interests this time, it is eminently possible

²⁰³ Mueller, *supra* note 175 (arguing that Ericsson, Samsung, and/or InterDigital may withdraw their ITC complaints).

²⁰⁴ Decker et al., *supra* note 189.

²⁰⁵ Neil Hughes, *Presidential Veto in Favor of Apple Expected to Alter Future Patent Litigation Strategies*, APPLEINSIDER (Aug. 5, 2013), <http://appleinsider.com/articles/13/08/05/presidential-veto-in-favor-of-apple-expected-to-alter-future-patent-litigation-strategies>.

²⁰⁶ See *id.* (stating that “Samsung will likely have less leverage to negotiate the compensation rates it originally wanted,” and that “the [executive] veto could also reduce the perceived value of some patents”).

²⁰⁷ See Mueller, *supra* note 12.

the public interest could rest with any number of the technological giants, including Samsung, in a future dispute. After all, the continuous smartphone patent litigation concerns more than just the profits of the companies involved; these legal disputes reverberate throughout the world's economy, for better or for worse.

The smartphone patent wars form a web of disputes across the entire globe. While the public at large would benefit if the onslaught of litigation were to subside, the smartphone patent wars appear unlikely to be something that is going to end, or even slow down, anytime soon.²⁰⁸ Until then, while the technology giants trade their money around from various legal victories to legal defeats, it is the public consumers who truly bear the risk of substantial harm from these disputes.

²⁰⁸ See Carrier, *supra* note 4, at 7.

